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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

SUFFOLK PARENTS OF HANDICAPPED ADULTS; IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE, and RICHARD ROE, as parents and guardians of, respectively, Lora Hoops; Andrew Gatland; James Sensale; Lourdes Aron; Glenna Hamid; Karen DeVoe; John Doe, and Rachel Roe,

*Petitioners,*

—v.—

JOHN B. WINGATE, as Commissioner of the Suffolk County Department of Social Services and SUFFOLK COUNTY; GEORGE PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE and BRIAN WING,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. BURKE
*Counsel of Record*
BURKE & STONE
*Attorneys for Petitioners*
400 Madison Avenue
New York, New York 10017
(212) 752-5353

ROBERT M. FREEDMAN
LISA KLEE FRIEDMAN
GEORGE S. STONE,
*Of Counsel*

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## Questions Presented

1. Does New York State's cutoff of funding for all of its severely disabled citizens, whom New York placed in out-of-state institutions, violate equal protection when New York continues funding for similarly disabled citizens whom it placed in-state?

2. Do petitioners, who are severely developmentally disabled or mentally ill young adults placed as children by New York State in out-of-state institutions, come within the protection of due process by meeting the "deprivation of liberty" standard of *DeShaney* v. *Winnebago County Department of Social Services*, 489 US 189, 200, 201 n. 9 (1989)?*

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* If the due process issue was the ground for this Court's denial of certiorari in the lead case of *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d 375 (Nov. 18, 1996), then only the equal protection issue appears to be presented. *But cf. Hopfmann* v. *Connolly*, 471 US 459 (1985).

## List of Parties

1. As in caption.

2. There are no parent companies and no nonwholly owned subsidiaries.

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## Citations Below

1. *This petition*: 101 F. 3d 818 (2 Cir.; Nov. 4, 1996, as amended Dec. 9, 1996).

   921 F. Supp. 970 (EDNY; Apr. 2, 1996).

2. *This case*: No. 96-7421 (2 Cir.; May 14, 1996; stay granted to county defendants).

   No. 96-7421 (2 Cir.; Dec. 31, 1996; mandate stayed).

   924 F. Supp. 431 (EDNY; Apr. 24, 1996; stay to county defendants denied in part.)

   ___ F. Supp. ___ (EDNY; May 17, 1996; payment by state directed.)

3. *Related cases*:

(a) *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d 375 (Nov. 18, 1996); *reversing Brooks* v. *Pataki*, 908 F. Supp. 1142 (EDNY 1995); stay opinion, 908 F. Supp. 1157 (EDNY 1995).

(b) *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996; injunction granted but stayed as to county); now on appeal, No. 96-9884.

(c) *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. NY):

(i) on Article 78 proceeding, unreported order (April 10, 1995); unappealed.

(ii) on declaratory judgment, unreported order (June 13, 1995); *aff'd.*, 220 AD 2d 236, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995); *lv. denied*, ___ AD 2d ___, ___ NYS 2d ___ (1 Dept.; Nov. 16, 1995), and 87 NY 2d 809 (Feb. 20, 1996).

## Jurisdictional Basis

The order of the Court of Appeals sought to be reviewed was initially entered 4 November 1996. (1-21a.) A petition for rehearing under FRAP 40(a) was duly filed on 14 November 1996. The Court of Appeals denied the petition but amended its order on 9 December 1996 (87-89a), and stayed its mandate on 31 December 1996 under FRAP 41(b). (84-86a.) The basis of this Court's subject matter jurisdiction is 28 USC § 1254(1).

## Statutes Involved

(i) *Funding*

*US Constitution, Amendment XIV, § 1*:

". . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*The TCF Statute (NY Social Services Law, § 466)*:

"(2) Social services districts may expend funds to provide transitional care as described in this section. Approved expenditures for transitional care by social services districts. . .shall be subject to state reimbursement at the rate of [60%] for periods on or after January [1, 1995].

* * *

(6) On and after January [1, 1999], all expenditures related to transitional care for persons remaining in such care at that time shall become the sole responsibility of either [OMRDD] or [OMH], whichever has accepted responsibility for the adult placement or services."

(ii) *Power to regulate out-of-state*

*US Constitution, Article I, § 10, third clause*:

"No State shall, without the Consent of Congress, . . .enter into any Agreement or Compact with another State. . .".

*Interstate Compact on Mental Health*

"The contracting states solemnly agree that:

Article I

The party states find that the proper and expeditious treatment of the mentally ill and mentally deficient can be facilitated by cooperative action. . .

Further, the party states find that the necessity of and desirability for furnishing such care and treatment bears no primary relation to the residence or citizenship of the patient. . .

Consequently, it is the purpose of this compact and of the party states to provide the necessary legal basis for the institutionalization or other appropriate care and treatment of the mentally ill and mentally deficient under a system that recognizes the paramount importance of patient welfare, and to establish the responsibilities of the party states in terms of such welfare.

* * *

Article III

* * *

(e) Pursuant to this compact, the determination as to the suitable place of institutionalization for a patient may be reviewed at any time, and such further transfer of the

patient may be made as seems likely to be in the best interest of the patient.

Article IV

(a) . . .If the medical or other appropriate clinical authorities having responsibility for the care and treatment of the patient in the sending state shall have reason to believe that aftercare in another state would be in the best interest of the patient and would not jeopardize the public safety, they shall request the appropriate authorities in the receiving state to investigate the desirability of affording the patient such aftercare in said receiving state, and such investigation shall be made with all reasonable speed.

* * *

(c) In supervising, treating, or caring for a patient on aftercare pursuant to the terms of this article, a receiving state shall employ the same standards of visitation, examination, care and treatment that it employs for similar local patients."

*The TCF Statute (NY Mental Hygiene Law, § 13.38.)*[1]

"(b) The office shall. . .develop a plan and implement procedures. . .to monitor the health and safety of persons receiving transitional funding as described in [NY SSL § 466]. . .

[T]he office shall establish standards governing the quality of care provided to such persons by the residential programs, including standards relating to the develop-

[1] This provision governs the New York Office of Mental Retardation and Developmental Disabilities. See NY MHL § 13.03(1). A parallel provision, NY MHL § 7.38, governs New York's Office of Mental Health. Each quoted provision also refers to "the adult care systems supervised or funded" by each office.

ment and monitoring of written individual services plans for each such person. . .and the investigation of complaints relating to the quality of care or services provided to such persons."

## Statement of the Case

### 1. The Facts

#### a. Introduction

This is the second of three related actions, brought sequentially as various counties of New York State progressively withdrew from a statutory program. While all constitutional issues discussed here were pleaded in all actions below, two appellate dispositions have been on different grounds. The third action awaits determination at the Court of Appeals.[2]

*Brooks* was decided at the Court of Appeals on alternate grounds of *res judicata* and due process. (84 F. 3d at 1463-4 [res judicata]; 1466-7 [due process].) The opinion of the Court of Appeals in this action, in contrast, did not involve *res judicata*; elaborated the *Brooks* due process ground, and

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[2] The five counties constituting New York City withdrew effective 1 June 1995, prompting the filing of *Brooks* v. *Pataki*, 908 F. Supp. 1142 (EDNY 1995), *r'vd. sub nom. Brooks* v. *Giuliani*, 84 F. 2d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d at 375 (Nov. 18, 1996; "*Brooks*" hereafter). Suffolk County's withdrawal, effective 1 January 1996, led to this action ("*Suffolk Parents*" hereafter). Westchester County's withdrawal one month later resulted in *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996), now on appeal. The remaining 55 counties of New York State have remained within the program as of the date of filing of this petition. A separate action, filed 3 February 1997, challenges administrative hearing requirements in all cases. *Nassau Parents and Guardians of the Handicapped* v. *Pataki*, No. CV 97-0551 (USDC, EDNY). Those issues are not presented in this petition.

added a full treatment of equal protection. (9-14a [due process], 14-20a [equal protection].)

It is clear that this Court's denial of *certiorari* in *Brooks* did not involve equal protection grounds. New York there argued that the issue was not presented.[3] Moreover, our letter supplemental to petition, based on this Court's grant of certiorari in an equal protection case, *Quill* v. *Vacco*, ___ US ___, 135 L. Ed. 2d 1127 (1996), was received the day after *certiorari* was denied. Accordingly, the equal protection issue was not before this Court in *Brooks*, but is presented here.

It is unclear whether the *Brooks* denial of certiorari was on grounds of *res judicata* or due process, as each issue was there presented. If *res judicata* was the reason, then there is no barrier here, because that defense was not interposed in *Suffolk Parents*. Accordingly, we reiterate and update our *Brooks* due process submission on the assumption (and in the hope) that the due process issue remains open. See *Hopfmann* v. *Connolly*, *supra* n. *, 471 US at 461.

### b. Summary

Petitioners[4] are severely retarded young adults, involuntarily institutionalized by New York State.

As children, all were institutionalized with a special education placement in neighboring states.[5] All were retained in

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[3] New York Brief in Opposition to Petition for a Writ of Certiorari, p. 11 (No. 96-373).

[4] This is an action commenced in Brooklyn federal court under the civil rights laws, 42 USC § 1983, in the name of the disabled individuals ("Petitioners"), by their parents or guardians. Violations of due process and equal protection are claimed.

[5] Pennsylvania; New Jersey; Connecticut; Massachusetts, and Rhode Island. All are parties to the Interstate Compact on Mental Health, codified at, respectively, 62 P.S. §§ 1121-1148; NJSA 30:7B-1 to 18; CGSA §§ 17a-615 to 618; MGLA c. 123 App., §§ 1-1 to 4, and [R.I.] Gen. Laws 1956, §§ 40.1-9-1 to 3. In New York, the Compact is codified at NY MHL § 67.07.

the same institutions when they reached adulthood, because no appropriate adult facilities were available in New York. All remain utterly incapable of making their own decisions for residence, care and treatment. (See 4-5a; 17-18a.)

Most petitioners have been severely disabled from birth. Other disabilities arose in childhood. In all cases, state action dealt with their condition, including initial placement; continuing funding; funding cutoffs, and attempted transfers.

New York State has stopped funding petitioners' care in order to force them to leave the institutions in which they have spent most of their lives, and which have become their homes. The sole reason for the cutoff is the out-of-state location of the institutions.

It is undisputed that:

(a) As children, petitioners were placed in neighboring states for special education by New York, because their disabilities were too severe for New York State treatment capabilities;

(b) New York funded the same placement after the children "aged out" of the educational placement when each became 21;

(c) There are still no appropriate, available in-state facilities. (4-5a; 17-18a.)

**c. State placements of children**

New York State has assumed responsibility for disabled children within its special educational process. See *Brooks*, *supra*, 908 F. Supp. at 1143. Support is given whether the disabled child is placed within New York State or outside of it. NY Educational Law, §§ 4401, *et seq*. In all cases, the State must approve the proposed placement. New out-of-state placements under the special education statute continue to this day.

### d. State funding for new adults

New York State continued to assume responsibility for these disabled children past their twenty-first birthday. In a program called "transitional care funding" ("TCF"), New York ratified and continued the initial placement because there remained no in-state facility appropriate for petitioners.

Annual budget appropriations were made from 1982 to 1993. In 1994, the TCF program was codified in various places, including § 466 of the New York Social Services Law ("SSL") and § 13.38 of the Mental Hygiene Law ("MHL") (collectively, the "TCF Statute").

Having "aged out" of an educational placement, petitioners remained at the same out-of-state institution under the TCF program. Only the source of funding changed. There remained no new in-state facilities appropriate for petitioners' severe disabilities.

### e. County withdrawal and state funding cutoff

New York State chose to share its TCF program responsibility with its 62 counties. It took the position that each county's participation was both voluntary and indispensable. When a county withdrew from the TCF program, as seven did, New York claimed that the TCF program ended as to those disabled individuals referred from a withdrawing county. Effective upon each county's withdrawal, New York State stopped paying for petitioners' out-of-state care.[6]

### f. State court statutory construction

In *Brooks*, upon notice of New York City's withdrawal, a group of parents sued in state court for a construction of the

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[6] All petitioners in *Brooks* were referred from the five counties within New York City, which is a single "social services district" under the TCF Statute. See NY SSL § 61(1). The sixth and seventh withdrawing counties were Suffolk and Westchester. 55 counties remain as of the date of this petition.

TCF Statute. They sought a declaration of, *inter alia*, the State's duty to fund the program share of any withdrawing county.

Two weeks after the effective date of the City's withdrawal, a trial-level court issued a declaratory judgment interpreting the funding aspects of the TCF Statute. It sustained the State's position that its payment was contingent upon county participation. *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. Ct., NY Co., June 13, 1995; unreported).[7]

## 2. Proceedings Below

### a. District Court

Following its earlier opinions in *Brooks* v. *Pataki*, 908 F. Supp. 1142 and 1157 (EDNY 1995), the District Court found state action in the institutionalization process; held that a notice period was required for county withdrawal from the TCF system, and imposed backup financial responsibility on New York State. On due process grounds, it held that funding could not be removed from these plaintiffs merely because a county chose to leave the system. *Suffolk Parents of Handicapped Adults* v. *Pataki*, 921 F. Supp. 970 (EDNY; April 2, 1996; 22-53a). Equal protection was discussed, but not decided. (40-41a; see 14a.)

In subsequent proceedings, the District Court stayed its injunction in part against the County defendants while directing immediate, full funding from New York State. *Suffolk Parents of Handicapped Adults* v. *Pataki*, 924 F. Supp. 431

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[7] The trial court's view was subsequently affirmed. *New York Council*, *supra*, 220 AD 2d 236, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995). Leave to appeal to the New York Court of Appeals was denied in orders by both the Appellate Division of the New York Supreme Court (Nov. 16, 1995), unreported, and the Court of Appeals, 87 NY 2d 809 (Feb. 20, 1996).

(EDNY; April 24, 1996; 54-74a), and ___ F. Supp. ___, 1996 WL 285423 (EDNY; May 17, 1996; 75-79a).

In the third related case, the District Court issued the same injunction as in *Suffolk Parents*, adding equal protection as an alternate holding, while rejecting a venue challenge. *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996). In the same opinion, reflecting appellate decisions in the earlier actions,[8] the District Court stayed its order as to the Westchester County defendants.

**b. Court of Appeals**

The first act of the Court of Appeals pertinent to this petition occurred on 14 May 1996, when it granted a full stay to the county defendants. *Suffolk Parents of Handicapped Adults* v. *Wingate*, No. 96-7421 (2 Cir.; May 14, 1996; 80-83a), partially reversing 924 F. Supp. 431 (54-74a). Two weeks later, it reversed the lead case on the merits. *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996). After argument of *Suffolk Parents* the following month, it directed supplemental briefing of equal protection issues. (14a.)

On 4 November 1996, the Court of Appeals reversed the District Court. On due process grounds, it did so under constraint of *Brooks* v. *Giuliani*, *supra*. (10-14a [majority]; 21a [Parker, J., concurring].) On equal protection grounds, it concluded that a lack of regulatory "control" over out-of-state facilities constituted a rational basis for admittedly disparate treatment. (14-20a.) Despite a written admission of New York's actual exercise of regulatory power over these petitioners (and those in *Brooks*) (90-96a)[9], the Court of Appeals

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[8] See *b*, below.

[9] That power is based, inter alia, on the Interstate Compact on Mental Health. Under the Compact Clause (Art. I, § 10), Congressional consent empowers states with common interests to agree to share regulatory power. The Court of Appeals ignored the regional regulatory system created by this Compact.

adhered to its decision upon rehearing, amending its language to make its conclusion of state impotence stronger. (*Cf.* 17a *with* 89a.)[10]

The Court of Appeals reluctantly denied relief in these words:

> "New York's program may well be bad public policy, but it does not violate the Equal Protection Clause." (19a; citation and internal quotation omitted.)

Despite its reversal, the Court of Appeals emphatically and unanimously recognized the crisis driving petitioners to this Court:

> "Unfortunately, there appear to be no placements available in New York for these plaintiffs. They have multiple, profound disabilities, and have special needs requiring particular services that are not everywhere available.
>
> * * *
>
> The *appalling fact* is that there is a limited capacity in New York State for the care and treatment of people who are as severely disabled as plaintiffs." (17-18a; emphasis added.)

## Summary of Argument

Despite the urgent language quoted above, the Court of Appeals twice refused to grant relief. Over a strong dissent, the *Brooks* panel found that individuals institutionalized and funded by New York State were somehow not within the "custody" found necessary in *DeShaney*, *supra*, despite an express reservation for this situation at n. 9 of this Court's opinion. The *Suffolk Parents* panel then found—despite an express

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[10] We await the decision of the Court of Appeals in *Westchester Advocates*.

written admission to the contrary by New York—that there was no power to "regulate" the out-of-state placement, thus providing a rational basis for disparate treatment.

Because New York can and does "regulate" the treatment of its citizens placed out of state, through payment and visitation (see 90-96a), petitioners submit that there is no rational basis for New York's admittedly disparate treatment of the severely disabled. (Point I, below.)

We also submit that *DeShaney*, *supra*, does not preclude the assertion of due process rights, as petitioners comfortably fit within the dictum of n. 9 of the *DeShaney* opinion. (Point II, below.)

We add a clarion note of urgency. Severely disabled young adults, fragile to the point of fracture and bonded to their caregivers of twenty years, face a devastating separation from their homes unless this Court holds that they are protected by the Fourteenth Amendment.

## ARGUMENT

### I. THERE IS NO RATIONAL BASIS FOR NEW YORK'S DISPARATE FUNDING OF SEVERELY DISABLED YOUNG ADULTS.

The ground rules of equal protection analysis on these facts are clear. A statute which distributes benefits unequally, as the TCF Statute does, is subject to at least rational basis scrutiny. *Zobel* v. *Williams*, 457 US 55, 60, 67 (1982). When state legislation is involved, as it is here, there is a presumption of constitutional validity if the statutory classification is "rationally related to a legitimate state interest". *City of Cleburne* v. *Cleburne Living Ctr. Inc.*, 473 US 432, 440 (1985).

The Court of Appeals properly found disparate treatment. (17a.)[11] It then concluded that an inability to regulate out-of-state programs constituted a "rational basis" for denying funding at age 21. (89a; *cf.* 17a.) Accepting such a justification *arguendo*, as a matter of constitutional theory, it fails both on principles of interstate cooperation and on the undisputed facts.

Regulation includes the power to affect conduct. New York "regulates" those who care for its citizens out-of-state by approving a placement, both initially and on a continuing basis, and by paying for the services provided. If an out-of-state caregiver violated New York's standards, the state could demand conforming change and withdraw the individual from that placement if no change occurred. The power of the purse includes an ability to control what is purchased.

This logical conclusion is assisted by both a New York statute and an interstate compact.

The TCF Statute itself applies to a placement "supervised *or funded*" by New York (NY MHL §§ 7.38[b], 13.38[b]; emphasis added). Aspects of the statute include the power to monitor; to establish standards; to remove the individual placed, and to withdraw funding. (*Ibid.*; see, also, subsection [d] of each.) There is no geographic limit to the statutory power; it applies to all "receiving transitional funding". NY MHL §§ 7.38(b); 13.38(b).

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[11] The disparate treatment was a creation of statute. New York created the division of the protected group by its placement of disabled children, with some retained in New York and others placed out-of-state. From 1982 to 1994, funding was provided for each group. The TCF Statute violated equal protection by denying funding to the out-of-state placements only. The State started with a protected group; divided it by its funding conduct under the TCF Statute, and then used its own conduct as the very justification for disparate treatment. As the District Court noted in *Brooks*, "[T]his. . .is the very essence of arbitrary state action." (908 F. Supp. at 1154, quoting from *Logan* v. *Zimmerman Brush Co.*, 455 US 422, 442 [1982].)

Even more to the point, a "receiving state", with the consent of Congress,[12] empowers New York's "regulation" under the 1956 Interstate Compact on Mental Health (the "Mental Health Compact").[13] The Mental Health Compact creates a "system" involving "cooperative action" in the area of "patient welfare." (Art. I.) It grants a "sending state" express powers of suitability review; retransfer; demand for investigation, and enforcement of uniform standards. (Arts. III[e]; IV[a], and IV[c].)

It is indisputable that the power to "regulate" out-of-state placements, through inspection and oversight, was actually exercised here. (90-96a.) The incorrect conclusion of absence of power to affect conduct cannot provide a rational basis for disparate treatment. As Mr. Justice Scalia has noted in another context:

> "[T]he Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things. . . .",[14]

There can be no legitimate state purpose served in leaving a group of profoundly disabled New York State citizens stranded in an out-of-state facility, at severe risk of being discharged to the street. This is a classic example of a withdrawal:

> "from [one group], but no others, of specific legal protection: . . . [I]t imposes a special disability upon those persons alone." *Romer* v. *Evans*, ___ US ___; 134 L. Ed. 2d 855, 863, 865 (May 20, 1996).

Accordingly, this Court should review and redress New York's violation of equal protection.

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12 U.S. Const., Art. I, § 10.

13 Codified at NY MHL § 67.07. See n. 5, *supra*, for codification in the states providing TCF care.

14 *United States* v. *Burke*, 504 US 229, 119 L. Ed. 2d 34, at 50 (1992; Scalia, J., concurring).

## II. THOSE INVOLUNTARILY INSTITUTIONALIZED BY STATE ACTION ARE WITHIN DUE PROCESS PROTECTION.

Petitioners submit that they are involuntarily institutionalized, by state action, and are within the due process protection hypothetical stated in *DeShaney*, *supra*:

> "Had the State, *by the affirmative exercise of its power*, removed Joshua from free society, and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration *or institutionalization* to give rise to an affirmative duty to protect." (489 US at 201, n. 9; emphasis added.)

Petitioners' position breaks no new constitutional ground. Generally, a protected interest may not be removed (by lack of funding, or otherwise) without due process. See, *e.g.*, *Paul* v. *Davis*, 424 US 693, 710-1 (1976), and *Vitek* v. *Jones*, 445 US 480, 489, 490 n. 6 (1980). This general principle was applied to the handicapped and retarded in state-directed custody in *Youngberg* v. *Romeo*, 457 US 307, 317 (1982).

*Youngberg* remained good law in this area after *DeShaney*. (See 489 US at 198-200.) The issue involved here is whether the facts of this case fit within this language in *DeShaney*:

> "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause. . . .". (489 US at 200; emphasis added.)

The consequence is clear. If there is no state deprivation of liberty, no due process obligation is owed even upon actual knowledge of impending abuse. If the state restrains liberty, then due process rights attach and are governed by *Youngberg*.

*supra*. The District Court based its injunction on *Youngberg*-protected rights, an analysis which Judge Parker endorsed in his dissent in *Brooks* at the Court of Appeals.

All panel judges agreed that there was state action in connection with the institutionalization of each petitioner. As the *Brooks* panel majority concluded, "We accept the idea of state action in this case *arguendo*", upon the following evidence:

> "[T]he State approved out-of-state placements, monitored out-of-state facilities, and in essence is deemed to have caused the out-of-state placement by its failure to find a satisfactory in-state placement." (84 F. 3d at 1466, n. 13.)

It is undisputed that petitioners' severe disabilities compel their institutionalization. As Justice Blackmun sensitively noted in *Youngberg*, *supra*:

> "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution, and total dependence on the institution for all of their needs, is as much liberty as they ever will know." (457 US at 327.)

*Youngberg*, not *DeShaney*, applies here. The facts of *DeShaney* did not rise to levels requiring *Youngberg* protection, because Joshua DeShaney was not institutionalized. Here New York, "by the affirmative exercise of its power, removed [petitioners] from free society, and placed [them]" in an out-of-state institution. (489 US at 201, n. 9.) This is an "institutionalization to give rise to an affirmative duty to protect" under *DeShaney*. (*Ibid.*)

On these facts, petitioners submit that the quoted language of *DeShaney* would conclude that their liberty interests were restrained by state action, and that *Youngberg* protection thereby attached, justifying the injunction. The duty to protect in *DeShaney* would become a duty to pay here: a duty to

continue the *status quo* (and home) enjoyed by each petitioner since childhood.

## Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

WILLIAM J. BURKE, ESQ.
*Counsel of Record*
BURKE & STONE
*Attorneys for Petitioners*
400 Madison Avenue
New York, New York 10017
(212) 752-5353

ROBERT M. FREEDMAN
LISA KLEE FRIEDMAN
GEORGE S. STONE,
*Of Counsel*